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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. COCHISE BAHAR LEE, Defendant and Appellant.	B227425 (Los Angeles County Super. Ct. No. TA105134)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gary R. Hahn, Judge. Affirmed.

J. Kahn, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Assistant Attorney General, Lance E. Winters and Elaine F. Tumonis, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Cochise Bahar Lee appeals from his conviction of first degree murder and three counts of attempted premeditated murder, and a true finding of a principal armed enhancement. He contends: (1) there was insufficient evidence to support the verdicts and (2) he was denied due process and a fair trial by the admission of evidence that he was a gang member. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On Monday night, January 26, 2009, Tania Horta hosted a 26th birthday party for murder victim Shakari Jama Taylor at the apartment in a Torrance apartment complex that Horta shared with her off-and-on boyfriend, Brandon Williams. Later that evening, Taylor was shot and killed within a few blocks of Horta's apartment. The evidence dealt both with events at the party and the circumstances of the shooting itself. We start with what happened at the party.

Defendant Cochise Bahar Lee was at the party in Horta's apartment. Defendant and Horta had a romantic relationship. Defendant had arrived at the party with several people, including his best friend, Darrian Tilmon. Victim Taylor parked his truck blocking Horta's garage. The party ended abruptly after defendant and Brandon got into a fistfight over Horta. Defendant left with Tilmon. Victim Taylor drove Keith Williams, Eric Johnson, and Ashley Powelle home from the party in Taylor's truck.[1] A few minutes later, about 12:30 a.m. on January 27, as Taylor turned left from 223rd Street onto Figueroa, multiple gunshots were fired at Taylor's truck. Keith, Johnson and Powelle escaped unharmed, but Taylor was fatally wounded.

Passenger Keith recalled that Taylor was stopped at a red light when the shooting started. After the truck spun around and hit a bus stop, Keith, Powelle and Johnson jumped out and ran back to the apartment complex. When the shooting stopped, Keith looked up and saw Taylor lying in the street and a woman standing over him. A car with

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[1] Brandon Williams (Horta's boyfriend) and witness Keith Williams are not related. To avoid confusion, we refer to them by their first names.

its window part way down was on the other side of the road. At the time, Keith thought this was the car from which the shots had been fired; he later learned it belonged to one of the dancers from the party who had stopped to help the victims. While Keith was calling 911, he heard sirens. Keith ran back to the truck and tried but failed to revive Taylor.

Brandon testified that he and Horta started arguing as soon as the party ended. This was after Brandon and defendant had fought over Horta. During the argument, Horta received a cell phone call and immediately ran out of the apartment. Brandon thought she left to meet up with defendant, but later learned she was running to the crime scene.

Horta testified that defendant was still on the patio when she started arguing with Brandon. She noticed defendant leave a little after Taylor. Shortly after defendant left, someone named "Kevin" called and told her that Taylor had been shot. Horta stayed on the phone with Kevin while she ran to the intersection where the shooting occurred. When she got there, an ambulance was already driving away and her phone died. Horta denied the accusation that it was defendant who called to tell her about the shooting and to tell her to not inform the police that defendant had been at the party. Horta did not initially tell the police that defendant was present because she thought it was not relevant. If defendant called and left her a message while her phone was dead, she never got it. When confronted with phone records showing a completed call from defendant to Horta at the relevant time, Horta speculated that defendant may have called her by accident because she received a call in which she could hear voices speaking in the background. Horta maintained she did not speak to defendant until she called him the next day. During that conversation, defendant said he had had nothing to do with the shooting.

Forensic evidence and analysis established that eight shots hit the right side of Taylor's truck, suggesting that the shooter was to the right of the truck. All eight shots were fired from the same gun; the shooter was in a vehicle of about the same size as Taylor's truck; the shooting occurred while Taylor's truck was in the intersection; the shooter's vehicle was moving from behind Taylor's truck to parallel with it; and the

trajectory of the shots made it unlikely that the shooter was in the passenger seat of the other vehicle.

The forensic evidence was consistent with the account of the shooting given by Kristina Toney-Sabanci (Toney), one of two exotic dancers Horta hired to entertain at the party. At the party, defendant called Toney a bitch when she introduced herself to him. When defendant and Brandon started fighting, Toney and the other dancer decided to leave. By the time they got dressed, the fight was over and the party guests were dispersing.

Toney and the other dancer were in Toney's car when Toney saw Taylor's truck stopped on an interior road, Harbor Ridge Lane, near the 223rd Street exit from the apartment complex. Thinking Taylor might be the source of future business, Toney drove to where he was parked and pulled up next to him to give him her phone number. As a result, Toney's and Taylor's vehicles were blocking Harbor Ridge Lane. When a white Lexus SUV approached from the opposite direction and honked, Toney pulled in front of Taylor's truck to make room for the Lexus to pass. Instead of passing, the Lexus pulled next to Toney's car and stopped, illuminating the inside of her car with its headlights. Inside the Lexus, Toney saw three black males, including defendant who was in the front passenger seat and his friend Tilmon who was driving.[2] Defendant first scanned the interior of Toney's car in a way that made Toney feel afraid; he next looked toward Taylor's truck. When the Lexus moved, Toney drove away thinking that something bad was about to happen.

From Harbor Ridge Lane, Toney turned right onto 223rd Street. Mistakenly believing she was going the wrong way, Toney made a U-turn. As she passed Harbor Ridge Lane, Toney saw the headlights of the white Lexus apparently waiting to exit onto 223rd Street. Realizing that she had been going in the correct direction after all, Toney turned around again. As she was driving on 223rd Street toward the freeway entrance,

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[2] Horta testified that defendant drove a black Infinity SUV, not a white Lexus SUV. She did not know anyone who drove a white Lexus.

Toney saw Taylor's truck about a half block ahead of her in the left lane; the white Lexus in which Toney had moments before seen defendant and Tilmon was in the right lane, a little behind Taylor's truck. Toney's car, Taylor's truck and the white Lexus were the only three vehicles on the street. Toney's attention was so focused on Taylor's truck as it moved into the left hand turn lane that she lost sight of the white Lexus. And when Taylor turned left onto Figueroa, she lost sight of the truck, too. But when Toney turned left, she saw Taylor's truck swerve, hop the sidewalk and hit a bus stop. Believing it was an accident (she did not hear any shots because her windows were closed and music was playing), Toney pulled over to help. She saw the three passengers jump out of the truck and run away; Taylor was slumped over the steering wheel. While Toney called the police, the other dancer pulled Taylor out of his truck and laid him on the ground. Toney was still on the phone with the dispatcher when an officer arrived.

Toney did not want to be involved in a murder investigation, so she told the officers who questioned her at the scene that she did not know what happened. But while waiting at the police station to be questioned again, Toney reconsidered. Accordingly, when Detective Ramirez questioned her at the police station, she told him that she saw the white Lexus waiting to pull out of the apartment complex on to 223rd Street and later saw it pull parallel to Taylor's truck. At trial, Toney testified that she said this only because Ramirez told her they "needed to place" defendant at the scene.[3] She also testified that because she was uncomfortable with her statement to police, Toney called Ramirez a few days later and told him she was not certain it was the white Lexus she saw on 223rd Street. The police report accurately reflected what Toney said in her phone call to Ramirez. Notwithstanding the uncertainty she expressed to Ramirez, at defendant's preliminary hearing, Toney testified that she saw the car in which defendant was a passenger (i.e., the white Lexus) in the right lane, a few feet behind Taylor's truck, and when the truck stopped for a red light, she saw the white Lexus was about three feet away. At trial, Toney testified, "During the preliminary hearing, I said I saw the white

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3 Both Toney and Keith were given money to relocate.

Lexus pull out of the complex. I said that I saw the vehicle on the street with me. I said that I saw the vehicle parallel to" Taylor's truck. But Toney said she was not really sure the other car was the white Lexus and she never saw it parallel to Taylor's truck. Toney explained: "Looking back, I wasn't prepared to be questioned, to have to testify [at the preliminary hearing]. I wasn't prepared for the behavior of the defendant's attorney. I wasn't prepared to be questioned the way I was and my words turned and flipped around and things like that. [¶] I believe the reason why I said that was because that was the last interview, the last statement that I gave. That was the information I gave in my last interview."

The jury convicted defendant as charged and found true the principal armed enhancement (Pen. Code, § 12022, subd. (a)(1)). After defendant's motion for new trial based on insufficiency of the evidence and ineffective assistance of counsel was denied, defendant was sentenced to 26 years to life for the murder with a principal armed enhancement, plus consecutive life terms plus one year for each of the three attempted murder convictions. The trial court struck the prior prison term enhancement (§ 667.5, subd. (b)).

DISCUSSION

A. Substantial Evidence Supports the Verdicts

Keith testified that Taylor and Brandon looked so much alike that when Keith saw Brandon in court, he initially thought it was his late friend, Taylor.[4] The People proceeded on the theory that the shooting was a case of mistaken identity and that Brandon was the intended victim. Its theory of the case was that defendant was not the shooter (i.e., direct perpetrator) but was an aider and abettor. Thus, in closing argument, the prosecutor conceded that there was no evidence that defendant was the shooter. The prosecutor argued that Tilmon was the shooter, but that defendant instigated the shooting for a variety of reasons, including that defendant mistook Taylor for Brandon with whom

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[4] Horta testified that she did not think Brandon and Taylor looked at all alike.

defendant wanted to settle the score for the earlier fight at the party. Since the prosecution did not argue defendant was the direct perpetrator, defendant's contention that there was not substantial evidence to support conviction on this theory need not be addressed.

Defendant also contends there was insufficient evidence to convict defendant of the murder and attempted murders on an aiding and abetting theory. He argues that there was no evidence he aided, encouraged, promoted or instigated the shooting. We disagree.

We begin, as always, with the standard of review. "Substantial evidence is evidence which is ' "reasonable in nature, credible, and of solid value." ' [Citation.] 'In reviewing the sufficiency of the evidence, we must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ' [Citation.] We must presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence. [Citation.] 'The focus of the substantial evidence test is on the *whole* record of evidence presented to the trier of fact, rather than on " 'isolated bits of evidence.' " [Citation.]' [Citation.]" (*People v. Medina* (2009) 46 Cal.4th 913, 919.)

"Principals include those who 'aid and abet' in the 'commission of a crime.' (§ 31.)" (*People v. Thompson* (2010) 49 Cal.4th 79, 116-117.) " '[A] person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime.' [Citation.]" (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 295-296.) Where, as here, guilt does not depend on the natural and probable consequences doctrine, the aider and abettor must share the intent of the actual perpetrator. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1118, & fn. 1.) Presence at the scene of a crime and failure to take steps to prevent a crime are insufficient by themselves to establish aiding and abetting liability. (*People v.*

Swanson-Birabent (2003) 114 Cal.App.4th 733, 743-744.) However, presence at the scene is a factor which may be considered in the analysis. Other factors include companionship with the actual perpetrator, and conduct before and after the crime, including flight. (*In re Juan G.* (2003) 112 Cal.App.4th 1, 5; *People v. Haynes* (1998) 61 Cal.App.4th 1282, 1294; *In re Jessie L.* (1982) 131 Cal.App.3d 202, 217.)

Here, there was substantial evidence that defendant aided and abetted the murder and attempted murders. First, Toney's testimony was sufficient to show that the shots came from the white Lexus and the forensic evidence was enough to show that the shots were fired by the driver. Second, evidence of defendant's presence, companionship and conduct support an inference that he aided and abetted the shooting. Defendant's presence was established by Toney's testimony. Companionship between defendant and the direct perpetrator can be inferred from Horta's testimony that defendant and Tilmon were best friends, that they arrived at the party and left together, as well as other evidence that Tilmon intervened on defendant's behalf when defendant was losing the fistfight with Brandon. Toney testified that after Tilmon maneuvered the Lexus so that its headlights illuminated the inside of her car, it was defendant who scanned the interior of Toney's car as if he was looking for someone. This conduct suggests defendant and Tilmon were working together to find someone. Finally, evidence that the Lexus drove away from the scene is evidence of flight.

A reasonable inference from all of this evidence is that defendant was bringing reinforcements back to the apartment to settle the score with Brandon, and that it was Brandon who defendant and Tilmon were looking for when Tilmon illuminated the interior of Toney's car with the headlights of the Lexus and defendant looked inside. The occupants of the white Lexus followed Taylor's truck because defendant mistook Taylor for Brandon, and Brandon was the intended victim.

The inconsistencies in Toney's trial testimony, what she told the police and her preliminary hearing testimony do not compel reversal. These and all other conflicts in the evidence were for the trier of fact to resolve. (*People v. Gonzales* (2001) 87 Cal.App.4th 1, 11.)

B. Admission of Gang Evidence Was Harmless Error

Defendant contends he was denied due process and a fair trial as the result of the admission of evidence that he was a gang member. He argues that evidence that defendant asked Keith, "Where are you from?" was tantamount to evidence of gang membership. The People counter that there was no express mention of gangs and the phrase "Where are you from?" is not evidence of gang membership. We conclude that in this case the phrase does suggest gang membership, but the error in admitting it was patently harmless.

Generally, where evidence is admitted that someone asks someone else, "Where are you from?," there is also evidence that the person asking the question is a gang member and of the unique meaning of that phrase in gang culture. For example, in *People v. Medina*, *supra*, 46 Cal.4th at pages 917-918, a witness knew from his experience as a former gang member that the phrase constitutes an aggressive first step; a gang expert also testified that a gang member who asks the question is usually armed and prepared to use violence. (See also *People v. Partida* (2005) 37 Cal.4th 428, 441 [gang expert testified that the statement constitutes a challenge in gang culture].) The phrase "Where are you from?" has become so closely associated with gangs in popular culture that we believe most jurors who hear it today will likely assume that the questioner is a gang member even without any additional information. This assumption is even more likely where, as here, there is evidence that the statement was made in an aggressive manner. In the absence of any argument by the prosecution that the statement was offered for another purpose, the exclusion of all gang evidence by the trial judge following a motion in limine should have included exclusion of this greeting, as well. Defendant objected to the statement. Assuming it was error to allow the statement in a trial which did not involve a gang offense or enhancement, and gang membership was essentially irrelevant, we find its admission harmless.

Generally, in determining whether erroneous admission of gang evidence is reversible error, we apply the *Watson* standard; in other words, determination of whether,

in the context of the entire record, it is reasonably probable a more favorable result would have been reached absent the error. (*People v. Hill* (2011) 191 Cal.App.4th 1104, 1140, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.) Where, as here, the defendant claims the error was so serious as to render his trial fundamentally unfair, the appellate court may be required to decide whether the erroneously admitted evidence was of "such quality as necessarily prevents a fair trial." (*People v. Garcia* (2008) 168 Cal.App.4th 261, 275.) The gang reference here – to the extent it was so understood by the jury – was so oblique and minimal that it could not have been prejudicial under either standard.

DISPOSITION

The judgment is affirmed.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.